

CLAUSE I-38 – DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (August 2002)

- (a) (1) SURA may, subject to paragraphs (c) and (d) below, by written notice of default to the Subcontractor, terminate this subcontract in whole or in part if the Subcontractor fails to –
 - (i) Deliver the supplies or to perform the services within the time specified in this subcontract or any extension;
 - (ii) Make progress, so as to endanger performance of this subcontract (but see subparagraph (a)(2) below); or
 - (iii) Perform any of the other provisions of this subcontract (but see subparagraph (a)(2) below).
- (2) SURA's right to terminate this subcontract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Subcontractor does not cure such failure within 10 days (or more if authorized in writing by SURA) after receipt of the notice from SURA specifying the failure.
- (b) If SURA terminates this subcontract in whole or in part, it may acquire, under the terms and in the manner SURA considers appropriate, supplies or services similar to those terminated, and the Subcontractor will be liable to SURA for any excess costs for those supplies or services. However, the Subcontractor shall continue the work not terminated.
- (c) Except for defaults of lower-tier subcontractors at any tier, the Subcontractor shall not be liable for any excess costs if the failure to perform the subcontract arises from causes beyond the control and without the fault or negligence of the Subcontractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of SURA in either its sovereign or subcontractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Subcontractor.
- (d) If the failure to perform is caused by the default of a lower-tier subcontractor at any tier, and if the cause of the default is beyond the control of both the Subcontractor and lower-tier subcontractor, and without the fault or negligence of either, the Subcontractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Subcontractor to meet the required delivery schedule.
- (e) If this subcontract is terminated for default, SURA may require the Subcontractor to transfer title and deliver to SURA, as directed by SURA, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and subcontract rights (collectively referred to as "manufacturing materials" in this clause) that the Subcontractor has specifically produced or acquired for the terminated portion of this subcontract. Upon direction of SURA, the Subcontractor shall also protect and preserve property in its possession in which SURA has an interest.
- (f) SURA shall pay subcontract price for completed supplies delivered and accepted. The Subcontractor and SURA shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. SURA may withhold from these amounts any sum SURA determines to be necessary to protect SURA against loss because of outstanding liens or claims of former lien holders.
- (g) If, after termination, it is determined that the Subcontractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of SURA.
- (h) The rights and remedies of SURA in this clause are in addition to any other rights and remedies provided by law or under this subcontract.